



1 Nick Mirr
2 Federal Defenders of Eastern Washington and Idaho
3 306 E. Chestnut Ave.
4 Yakima, Washington 98901
5 509.248.8920
6 Attorney for Andrei Stephanovich Borgheriu
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6 United States District Court
7 Eastern District of Washington
8 Honorable Stanley A. Bastian
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8 United States,

9 Plaintiff,

10 v.

11 Andrei Stephanovich Borgheriu,

12 Defendant.

13 No. 4:22-CR-6040-SAB
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13 Reply RE: Motion to Dismiss
Counts 1 and 2 and Motion for
Miscellaneous Relief¹

14 February 10, 2025 – 9:30 a.m.
15 Richland, WA — With Argument
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¹ The opening brief was inadvertently styled as a motion to dismiss the entire indictment. ECF No. 114. The reply has been edited to reflect Mr. Borgheriu is moving to dismiss only Counts 1 and 2.

I. Introduction

In its response, the government makes several arguments in an effort to save Counts 1 and 2 of the indictment from being dismissed. First, it argues that the motion is untimely. Second, the government argues that Mr. Borgheriu did indeed intend to defraud the SBA of a cognizable property interest—money. Therefore, they argue, the conduct falls within the ambit of the wire fraud statute. Each of the government’s positions is incorrect and Mr. Borgheriu will address each in turn.

II. Argument

A. The Motion to Dismiss Counts One and Two is timely.

As an initial matter, the government argues that Mr. Borgheriu’s motion is untimely.² It cites for support several scheduling orders that have been filed in this case and notes that because the motion attacks the sufficiency of the indictment, it could have been filed previously.³ This argument, however, ignores that this case was reassigned after Judge Dimke recused herself in January of 2024.⁴ After her recusal and the subsequent reassignment of the case, no further scheduling order was published that listed an expired pretrial motions deadline. Indeed, most recently this Court granted defense’s motion to continue on August 28, 2024, over the government’s

² ECF No. 117 at 4.

3 *Id.*

⁴ ECF Nos. 81 and 82.

1 objection.⁵ In defense's motion, counsel requested the Court "re-set[] all applicable
2 pretrial dates."⁶ In its order, the Court set only a deadline for trial briefs, *voir dire*, jury
3 instructions, and other trial documents and was silent as to the issue of pretrial
4 deadlines.⁷ In the absence of a specific deadline, defense counsel takes the position that
5 the Rules of Criminal Procedure apply, which specifically state that "[i]f the court does
6 not set [a deadline for pretrial motions], the deadline is the start of trial."⁸

7 Here, defense counsel did not wait until the start of trial to file its motion.
8 Rather, the motion was filed roughly three- and one-half weeks prior to trial and the
9 government had ample time to draft a response.⁹ Further, there is no unfair surprise as
10 the defense filed this motion only after reviewing similar, recent pleadings in *U.S. v.*
11 *Hilderbrand*, a case involving the same government counsel.¹⁰ The response briefing in
12 each case is remarkably similar. Further, the issue has taken on greater significance

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1 after the Supreme Court oral argument in *Kousisis*, which of course is long after any
2 prior case management orders setting out deadlines for dispositive motions.¹¹

3 Ultimately, the motion was filed in accordance with the Rules' timelines, there
4 is no prejudice, and the motion presents important and developing legal issues that
5 benefit from full briefing. The Court should reject the government's timeliness
6 arguments.

7 **B. The government merely alleges that the SBA has been deprived of the right
8 to control expenditure of EIDL funds after parting ways with them. This is
9 not a cognizable, traditional property interest.**

10 In its response, the government argues that Mr. Borgheriu reads additional
11 language into the indictment by identifying the SBA's interest as that to control the use
12 of the EIDL funds after disbursement.¹² This argument, however, misstates the
13 indictment. Indeed, the government explicitly alleges that Mr. Borgheriu "applied for
14 and received one EIDL . . . with the intent to defraud, steal, and convert the proceeds
15 of the EIDL loan for [his] personal use and *without intent to use the proceeds thereof for
any authorized purpose.*"¹³ Thus, in the plain language of the indictment, the
16 government has identified the alleged harm to the SBA in the same manner as defense

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19 ¹¹ [Transcript of Oral Argument](#), *U.S. v. Kousisis*, No. 23-909 (Dec. 9, 2024).

¹² ECF No. 117 at 5-6.

¹³ ECF No. 1 at 3 (emphasis added).

1 did in its motion—the harm occurred because the funds were allegedly used in an
2 unauthorized manner.

3 Despite the government's assertions to the contrary, there is no alleged harm to
4 a traditional property interest. The government does not allege that Mr. Borgheriu
5 lacked the intent to repay the SBA, that he fabricated documents relied upon to
6 determine the loan value, or that the SBA will somehow not recoup the loan, plus
7 interest. There is no argument that Mr. Borgheriu was eligible for the loan and
8 provided truthful information about his business to establish eligibility. There is only an
9 alleged “injury” in that the SBA has been unable to dictate how the loan proceeds are
10 being used after disbursement. This is not cognizable under the wire fraud statute.

11 The government relies on several non-binding cases out of New York and
12 Florida to argue that the wire fraud statue reaches EIDL loans. The cases, however, are
13 inapposite. In *Mansouri*, the indictment alleged that Mr. Mansouri “falsely represented
14 revenues and cost of goods sold” by his company in his EIDL application.¹⁴ There
15 were no allegations regarding the downstream use of EIDL funds.

16 Again, in *Smith*, the alleged scheme is also materially different from the scheme
17 alleged here.¹⁵ Mr. Smith was alleged to have made misrepresentations about “the
18 dates he was in business, the number of employees he employed, his amount of
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¹⁴ *U.S. v. Mansouri*, 2023 WL 8430239 at *2 (W.D.N.Y. Dec. 5, 2023).

¹⁵ *U.S. v. Smith*, 2024 WL 4545904 (W.D.N.Y. Aug. 29, 2024).

1 monthly payroll, his revenue, his cost of goods sold, or a combination of the above" in
2 applications for PPP and EIDL loans.¹⁶ Again, conspicuously absent from *Smith* are any
3 allegations that downstream use of the EIDL funds was a basis for prosecution.

4 *Sheppard*, the final case the government relies on, while superficially similar to
5 Mr. Borgheriu's case, again relies on disparate and inapposite reasoning.¹⁷ There, Mr.
6 Sheppard was alleged to have "submitted false and fraudulent" PPP and EIDL
7 applications to the SBA in which he "forged signatures of other persons for certain
8 documents."¹⁸ The court did not even "reach the question of whether [the] SBA was
9 harmed as to regulatory interests" regarding the use of the EIDL after finding the
10 convictions could be sustained "under a banks-as-victims theory."¹⁹

11 All three of these cases are inapplicable to Mr. Borgheriu's case because they
12 involve allegations of fraud of a completely different nature. In each of the three cases
13 relied upon by the government, the schemes involved lies about the business itself or
14 fabrication of business records used in the application process that impacted their
15 eligibility for funding. Not so with Mr. Borgheriu. Indeed, nowhere does the
16 government allege that Mr. Borgheriu falsified records or misled the SBA about the
17 state of his business. There is no allegation they were deceived about any material facts

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¹⁶ *Id.* at *1.

¹⁷ *U.S. v. Sheppard*, 2024 WL 2815278 (S.D. Fla. June 3, 2024).

¹⁸ *Id.* at *1.

¹⁹ *Id.* at *18. That theory is not included in the indictment in this case.

1 surrounding the business itself. The only allegation here is that Mr. Borgheriu's
2 downstream use of the funds was outside the SBA's regulatory objectives.

3 Similarly, the government's attempts to distinguish *Bruchhausen*, *Milheiser*, and
4 the defense's "Steph" hypothetical overlooks critical points of the analyses in those
5 cases. Specifically, the government argues *Bruchhausen* and *Milheiser* are
6 distinguishable from the instant case by asserting that the SBA was not engaged in a
7 commercial transaction or "seeking something of value" from Mr. Borgheriu.²⁰ Not
8 only is this inaccurate, but it identifies a distinction without a difference. In *Milheiser*,
9 false representations were made to customers that specifically induced them to make
10 purchases, and part way with money in exchange for goods.²¹ In *Bruchhausen*, false
11 representations were made to manufacturers about the destination of their products
12 that they specifically relied on in making the deal and that caused them to part ways
13 with their property in exchange for money.²² Money and goods are certainly
14 "traditional property interests." However, the mere fact that traditional property
15 interests were involved in the bargains in *Milheiser* and *Bruchhausen* there did not
16 simultaneously convert the *affected interests* into a traditional property interest. Again,
17 there is no dispute that money has changed hands here. But merely because money has
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19 ²⁰ ECF No. 117 at 7-8.

²¹ *U.S. v. Milheiser*, 98 F. 4th 935, 938 (9th Cir. 2024).

²² *U.S. v. Bruchhausen*, 977 F.2d 464, 466 (9th Cir. 1992).

1 changed hands, it does not mean fraud has occurred.²³ The misrepresentation must
2 have gone to “something essential to the bargain itself.”²⁴

3 Here, the SBA did indeed part ways with money, a traditional property interest.
4 However, they did so in exchange for a promise of repayment with interest. The mere
5 fact that they also relied on an ancillary promise of how that money would be spent *in*
6 *the future and with no retained authority over the funds* does not mean there has been any
7 injury to a traditional property interest, despite the SBA parting ways with money.
8 Even if they would not have entered the bargain without that promise, it does not
9 convert their downstream, regulatory interest into a traditional property interest.²⁵ The
10 indictment explicitly fails to allege any scheme by Mr. Borgheriu to default on the loan
11 or fail to make payments. Accordingly, there is no cognizable injury to a traditional
12 property interest here.

13 The government attempts to shift the essentials of the bargain and bolster its
14 position by pointing out that the SBA offered low-interest loans to further their interest
15 in “alleviat[ing] economic injury to [Mr. Borgheriu’s] business caused by the
16 pandemic.”²⁶ For some reason, the government contends, because the SBA didn’t

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²³ *Milheiser*, 98 F. 4th at 942-43.

²⁴ *Id.* at 943.

²⁵ See *Bruchhausen*, 977 F.3d at 467-68 (noting that even if the manufacturers would not have entered the bargain had they known the true destination of their products, it did not convert their interest in controlling the destination into a traditional property interest).

²⁶ *Id.* at 8-9.

1 enter a particularly lucrative contract, it necessitates a finding that there is a traditional
2 property interest involved.²⁷ Not so. Again, while there may be understandable and
3 perhaps laudable intent behind the SBA’s attempt to control the downstream use of
4 EIDL funds, it does not convert their desires as to how the money is spent into a
5 traditional property interest.

6 As a final note, the government’s attempts to distinguish this case from *Milheiser*
7 and *Bruchhausen* appears related to their argument that they are not proceeding on a
8 “fraud in the inducement” theory. It likewise falls flat. The indictment specifically
9 alleges that, “[b]eginning no later than on or about June 29, 2021” Mr. Borgheriu had
10 devised a scheme to obtain money from the SBA and use it for an unauthorized
11 purpose.²⁸ The plain language of the indictment makes it clear, the government’s
12 theory is that Mr. Borgheriu had the intent to use EIDL funds for an “unauthorized”
13 purpose at the time he applied for the loan and that that intent was integral to the
14 SBA’s decision to disburse the funds.²⁹ Defense counsel fails to see how the
15 government can argue they are not proceeding with a fraud in the inducement theory.

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17 ²⁷ The fact the SBA charged interest at all belies the government’s argument that this is a
charitable act.
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²⁸ ECF No. 1 at 3.

19 ²⁹ The government’s argument in its response brief raises concerns that it will attempt to argue at
trial a theory of fraud that is at odds with the plain language of the indictment and may constitute a
variance.

III. Conclusion

The government has failed to allege a scheme by Mr. Borgheriu to defraud the SBA of a traditional property right, irrespective of the fact money has changed hands. Counts One and Two of the indictment must be dismissed.

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Federal Defenders of Eastern Washington & Idaho
Attorneys for Andrei Stephanovich Borgheriu

s/ Nick Mirr
Nick Mirr, AT0014467
Iowa State Bar Ass'n
306 E. Chestnut Ave.
Yakima, Washington 98901
t: (509) 248-8920
nick mirr@fd.org

Service Certificate

I certify that on January 29, 2025, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which will notify Assistant United States Attorneys: Jeremy J. Kelley and Frieda K. Zimmerman.

s/ Nick Mirr
Nick Mirr, AT0014467
Iowa State Bar Ass'n
306 E. Chestnut Ave.
Yakima, Washington 98901
t: (509) 248-8920
nick mirr@fd.org